Supreme Court, U.S.
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No. 03-292

In the Supreme Court of the United States

TRICIA LEROHL, SHELLEY HANSON,
Petitioners,

v.

FRIENDS OF MINNESOTA SINFONIA,
JAY FISHMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this Court's holding in *Clackamas Gastroenterology Associates, P.C. v. Wells*, __ U.S. ___ 123 S.Ct. 1673, 155 L.Ed.2d (2003) that the common law factor of "control" is the principal guidepost in determining whether shareholder-directors in a professional corporation are employees for the purpose of satisfying the 15-employee requirement of the 42 U.S.C. § 12111(5)(A), require the reconsideration of a decision in which the Eighth Circuit held that petitioners were independent contractors and not employees based upon the holding in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT FRIENDS OF THE MINNESOTA SINFONIA

Friends of the Minnesota Sinfonia is a Minnesota not for profit corporation. It is not publicly traded and no publicly-held company owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT 1

***CLACKAMAS* ESTABLISHED A STANDARD TO DETERMINE WHETHER AN INDIVIDUAL IS AN EMPLOYEE OR AN EMPLOYER BUT DID NOT CHANGE THE STANDARD TO DETERMINE WHETHER A HIRED PARTY IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR** 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Clackamas Gastroenterology Assoc., P.C. v. Wells, 123 S.Ct. 1673, 155 L.Ed. 2d 615 (2003) 1, 2, 3, 4, 5

Lawrence v. Chater, 515 U.S. 163, 170, 116 S.Ct. 604, 608, 133 L.Ed.2d 545 (1996) 5

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) 2, 3, 4, 5

Papa v. Katy Industries, Inc., 166 F.3d 937, 940 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019, 120 S.Ct. 526, 145 L.Ed.2d 408 (1999) 2

Statutes

42 U.S.C. §12111(5)(A) 2

STATEMENT OF THE CASE

Although petitioners Tricia Lerohl and Shelley Hanson describe most of the facts and proceedings below essentially accurately, it is necessary, pursuant to Supreme Court Rule 15, to correct their misstatement that Respondent Jay Fishman did not oppose Hanson's motion for partial summary judgment against him. Indeed, Fishman vigorously opposed her motion, and in fact moved for partial summary judgment on her ADA claims on the grounds that Hanson was an independent contractor.

ARGUMENT

CLACKAMAS ESTABLISHED A STANDARD TO DETERMINE WHETHER AN INDIVIDUAL IS AN EMPLOYEE OR AN EMPLOYER BUT DID NOT CHANGE THE STANDARD TO DETERMINE WHETHER A HIRED PARTY IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR.

The petitioners ask this Court to grant the petition for a writ of certiorari, vacate the opinion of the Eighth Circuit below, and remand for reconsideration based upon *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 123 S.Ct. 1673, 155 L.Ed. 2d 615 (2003). The fatal flaw in their argument is that *Clackamas* does not involve the issue raised in this case. The trial courts and the court of appeals held that petitioners are independent contractors, not employees. *Clackamas* addressed the distinct question of whether company owners actively involved in the operations of their business are employees or employers. *Clackamas*, 123 S.Ct. at 1698 n.5. As *Clackamas* has no bearing on the issue here, it cannot justify grant of certiorari, vacatur and remand ["GVR"].

Petitioners' entire argument is an attempt to apply an inapplicable legal rule to obtain reversal of the summary judgment dismissing their claims. The district courts granted summary judgment on the basis that, under this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), petitioners were independent contractors, rather than employees, and as such did not have standing to sue under the ADA or Title VII. The Eighth Circuit affirmed, and subsequently denied their petition for rehearing or rehearing en banc.

After Hanson and Lerohl filed their petition for rehearing below, but before the Eighth Circuit acted upon it, this Court decided *Clackamas*. Hanson and Lerohl called the *Clackamas* decision to the attention of the court of appeals under Rule 28(j) Federal Rules of Appellate Procedure while their petition was pending.

Clackamas addressed the question of whether four physician-shareholders in a professional corporation could be counted as employees for the purpose of determining whether the corporation was an "employer" as defined in 42 U.S.C. §12111(5)(A). The statute defines the term "employer" to mean an enterprise which has 15 or more employees at applicable times. Recognizing the burdens of "mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail," Congress exempted firms with fewer than 15 employees from the coverage of the ADA and Title VII. *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019, 120 S.Ct. 526, 145 L.Ed.2d 408 (1999).

In *Clackamas*, Deborah Wells, a bookkeeper employed by Clackamas Gastroenterology Associates, P.C., sued, alleging violations of the ADA. The defendants moved

for summary judgment, arguing that the firm did not meet the ADA's 15-employee requirement because the four physician-shareholders were not "employees" and without them there were only 14 employees. Relying on an "economic realities" test articulated by the Seventh Circuit, the district court granted the motion. The Ninth Circuit reversed, citing the Second Circuit's rejection of the economic realities test, and held that the physicians' use of a corporate structure precluded any analysis to determine whether they were, instead, a partnership. *Clackamas*, 123 S.Ct. at 1676.

This Court granted certiorari to resolve the conflict among the circuits. Rejecting the approaches taken by both the district court and the Ninth Circuit, this Court instead looked to the common law for guidance, as it had in other cases that turned on the definition of the term "employee." *Clackamas* at 1678 (citing *Darden*, 503 U.S. at 322, 112 S.Ct. 1344, 117 L.Ed.2d 581).

Citing the factors described in *Darden* for the common-law test for determining whether a hired party is an employee, the Court recognized that "[t]hese particular factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer." *Clackamas* at 1678 n.5.

To answer the distinct issue raised in *Clackamas*, the Court looked to the common law's description of the master-servant relationship, and held that "the common-law element of control is the principal guidepost that should be followed in this case." *Clackamas* at 1679. The Court acknowledged that guidelines promulgated by the EEOC also used this approach to address this issue.

According to the Court, the guidelines address "the broad question of who is an 'employee,'" as well as "the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." *Clackamas* at 1679. To answer the "broad question," the EEOC lists 16 factors from *Darden* relevant to "whether the employer controls the means and manner of the worker's work performance."[1] *Id.* To answer the "narrow question,"-- framed by the EEOC as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control" -- the EEOC looks to six *different* factors. *Id.* at 1680.[2]

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[1] *Darden* described the factors used in the common law test for employment status as:
"the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Darden*, 503 U.S. at 323-324, 112 S.Ct. 1344.

[2] *Clackamas* described these factors as:
"Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
"Whether and, if so, to what extent the organization supervises the individual's work
"Whether the individual reports to someone higher in the organization
"Whether and, if so, to what extent the individual is able to influence the organization
"Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
"Whether the individual shares in the profits, losses, and liabilities of the organization."
Clackamas, 123 S.Ct at 1680 (citing EEOC Compliance Manual § 605:0009.

Thus, the *Clackamas* Court established a test to determine whether the individual is an *employee or employer* which is *different from* the test used to determine whether an individual is an *employee or independent contractor*. And it re-affirmed that the *Darden* test does not emphasize any particular factor. *Id.* at 1681 ("as was true in applying common law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'") (quoting *Darden*, 503 U.S. at 324, 112 S.Ct. at 1344). Petitioners' argument that *Clackamas* changes the analysis used to determine independent contractor or employee status is wholly without merit.

Although GVR can be an effective tool where "recent events have cast substantial doubt on the correctness of" a lower court's opinion, there are no such "recent events" here. *Lawrence v. Chater*, 515 U.S. 163, 170, 116 S.Ct. 604, 608, 133 L.Ed.2d 545 (1996). Rather than changing the independent-contractor-versus-employee test applied by the Eighth Circuit below, *Clackamas* establishes a test to resolve the employer-versus-employee issue. Granting certiorari, vacating the Eighth Circuit's opinion, and remanding for reconsideration in light of *Clackamas* would therefore be a pointless exercise. Accordingly, respondents Jay Fishman and Friends of Minnesota Sinfonia respectfully ask that the Court deny the petition.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Dated: September 19, 2003.

Respectfully submitted,

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